

CASE NO. 15-35404

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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SHERRI ROBERTS,

Plaintiff - Appellant,

RANDY ELLIOT, JIM SCOTT, HAWK HAAKANSON, and UNITED  
STATES OF AMERICA,

Defendants – Appellees.

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On Appeal from a Decision of the United States District Court  
For the District of Montana, Billings Division  
No. 1:13-cv-00026-SEH and 1:14-cv-000016-SEH  
Honorable Sam E. Haddon

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**BRIEF OF APPELLANT**

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## I. STATEMENT OF JURISDICTION

The District Court had jurisdiction of the individual capacity claims against the BIA law enforcement officers under 28 U.S.C. §1331, as the claims arise out of the Constitution of the United States. The basis of jurisdiction for the claims against the United States of America under the Federal Torts Claim Act is 28 U.S.C. §1346 (b).

The *Memorandum and Order* signed by the District Court on March 19, 2015 is a final appealable order, disposing of all claims. (ER 4).<sup>1</sup> Rule 54(b), Fed. R. Civ. P. The basis of this Court's subject matter jurisdiction is 28 U.S.C. § 1291.

The Judgment was entered on March 19, 2015. (ER 3). The Notice of Appeal was timely filed pursuant to Rule 4 (a), Fed. R. App. P. (ER 1).

## II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting summary judgment against Plaintiff on the grounds that the individually named BIA law enforcement officers had qualified immunity when the law was clearly established at the time of Plaintiff's arrest and detention that the Tribal Court lacked any criminal jurisdiction over Plaintiff, and the Officers were on notice that she was non-Indian.

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<sup>1</sup> Cites to "ER" refer to the Excerpts of Record.

2. Did the District Court err in granting summary judgment against Plaintiff on her claim against the United States for false arrest and false imprisonment when genuine issues exist as to whether the Tribal warrant lacked probable cause when the Tribal Judge ordered the Officer to arrest and deliver a non-Indian to a Tribal Jail while the Tribal Court had no criminal jurisdiction over Plaintiff, and as to whether the Officer's reliance on the warrant was not objectively reasonable.

3. Did the District Court err in granting summary judgment against Plaintiff on her claim of negligent infliction of emotional distress when disputed issues exist as to whether Plaintiff's serious emotional distress was a reasonably foreseeable consequence of the Officer's act of arresting and delivering Plaintiff to the Tribal jail when the Officer was on notice that Plaintiff was a non-Indian.

### **III. STATEMENT OF THE CASE**

In 2005, Sherri Roberts ("Roberts") and her husband moved to Montana. Roberts worked for the Lame Deer School District as a vocational agricultural teacher and Future Farmers of America (FFA) advisor for five years and lived on the Northern Cheyenne Reservation. (ER 19, 99 at ¶ 2). Roberts is Caucasian, non-Indian, and not an enrolled member of any Indian tribe. (ER 103 at ¶ 14).

In 2009, Roberts became involved in a dispute with the Northern Cheyenne

Tribe regarding the lease of land on the reservation for the FFA animals. (ER 99 at ¶ 2). Roberts was cited in the Northern Cheyenne Tribal Court with trespass for not immediately removing FFA animals from a lease the FFA had obtained. At the time, she was no longer involved in the FFA program. (ER 80).

When waiting for attorney Mike Eakin to meet with Roberts and the FFA kids over the situation with the animals on the leased land, Defendant/BIA Officer Randy Elliot (Elliot) came walking up and served Roberts with the Tribal Court papers. (ER 36 at 14-25, 99). Roberts asked Elliot about the warrant and being a non-Indian, and Elliot told her she needed to appear in court on April 23, 2009. (ER 37, 38).

Roberts appeared for an arraignment before the Tribal court with her Tribal court advocate, Mark Wondering Medicine. (ER 40, 41). Roberts recalls that the courtroom was full, that she pled not guilty to the charge, and that her advocate requested that the matter be set for a jury trial. (ER 41 at 15-19).

Tribal Court Judge Brady attests that she was made aware at the arraignment that Roberts was a non-Indian. (ER 92, 93 at ¶ 3). Judge Brady also asserts that she advised Roberts of her right to assert lack of personal jurisdiction of the court purportedly under Rule 9(B)(3) of the Northern Cheyenne Code of Criminal Rules. (ER 93 at ¶ 3). Roberts does not recall any discussion at the initial hearing regarding jurisdiction. (ER 99-100 at ¶ 5).



At some point, Judge Brady entered a note on the bottom of the complaint, which states: “Defendant waived personal jurisdiction, works here, did not want to be excluded,” and a similar note on the bottom of the summons. (ER 93 at ¶ 7; 80). It is unknown when these notations were actually placed on these documents; Roberts does not believe she waived personal jurisdiction and this notation is not contained on the original documents that Roberts received copies of from the Tribal clerk shortly after the arraignment. (ER 100 at ¶ 6).

Roberts was directed by the Tribal Court to appear at a pretrial conference on May 4, 2010. (ER 81). Roberts acknowledged the notice and signed the notice to appear on April 26, 2010. (ER 81). Roberts and her advocate attended the pretrial conference, and again requested a jury trial. (ER 82).

A status conference to schedule the date and time of trial was apparently set for July 20, 2010. (ER 83). Roberts did not appear at the July 20, 2010 status conference as she had received no written notice of the hearing. (ER 42 at 24).

As a result of Roberts’ failure to appear at the status conference, a bench warrant was issued for Roberts’ arrest. BIA Law Enforcement Officer Hawk Haakanson (Haakanson) executed the warrant on July 24, 2010. (ER 84, 43 at 13-25, 100 at ¶ 7). He arrested Roberts while she was at a meeting with Tribal elders and others at Veterans Park in Lame Deer, Montana discussing

improvements to the park. (ER 100 at ¶ 7). Haakanson handcuffed her, transported her against her will, and delivered her to be incarcerated at the BIA detention facility. (ER 100 at ¶ 7). At the time, Haakanson was fully aware of Roberts' non-Indian status. They had recently discussed it on the porch of the BIA when the FFA tractor was taken in March. (ER 51 at ¶ 11-25).

Haakanson's knowledge of Roberts' non-Indian status is uncontroverted in the record below.

Haakanson brought Roberts into the Tribal detention center where BIA Law Enforcement Officer/Defendant Jim Scott (Scott) was immediately present at the Tribal Jail when Officer Haakanson brought Roberts in. Scott said, "you got her"; looked over the paperwork; and questioned why they should let Roberts try to make bail. (ER 47 at 22-25; 51 at 1-10).

Roberts was made to strip out of her clothing and put on jail clothing. She was placed in the general population of the Tribal jail run by the BIA. (ER 56-58.) At some point, Roberts posted a bond, and was released from custody. (ER 85). Upon her release, Roberts was directed to appear before the Tribal Court on July 26, 2010. (ER 85). Roberts appeared and filed a request with the court at that time that all notices and other pleadings be sent to her as well as to her legal advocate. Roberts never received any future notices of any proceeding.

(ER 91, 99-101).

After Roberts' first arrest and being jailed in the Tribal jail, she retained Billings attorney Bill O'Connor concerning the Tribal Court's prosecution, arrest, and imprisonment of her, and the lack of any criminal jurisdiction. (ER 101 at ¶ 9). On August 17, 2010, Roberts went to the clerk of Tribal Court to obtain a complete copy of all documents in her criminal case. (ER 86). Roberts delivered the complete copy of the court file to Mr. O'Connor. She did not alter the documents in any manner before providing them to her attorney. Contained within this copy of the court file provided to Roberts by the clerk of Tribal court are the Criminal Complaint and the Warrant of Arrest. (ER 101, 106, 107). There is no notation by Judge Brady on either of these documents that were contained in the court file on August 17, 2010, at the time she obtained them. (ER 101 at ¶ 9).

On or about October 20, 2010, Roberts received a copy of a letter written by her counsel Mr. O'Connor advising the prosecutor of the Northern Cheyenne Tribe of the "unlawful criminal charges" and that Roberts was "clearly not subject to the jurisdiction of the Tribal court; that she was "neither a member of the Northern Cheyenne tribe," nor a Native American. He objected to her arrest and her incarceration in the tribal detention facility. (ER 108, 109). The day after the

letter by Mr. Connor was sent via facsimile transmission to the Tribal prosecutor, a bench warrant was issued to arrest Roberts on October 21, 2010. (ER 87, 102 at ¶ 11).

The Northern Cheyenne Court Criminal Division Minute Entries do not indicate that Roberts waived personal jurisdiction at any time at any hearing in the criminal case. (ER 90).

Roberts was again charged with failure to appear for a status conference on October 19, 2010, and a second bench warrant was issued for her arrest on October 21, 2010. (ER 87). Roberts had no notice of the status conference and had at that point disputed jurisdiction by the Tribal Court through her attorney O'Conner. (ER 101, 102). The warrant again commanded Tribal law enforcement to arrest Roberts and bring her before the Tribal court for failure to appear. (ER 87).

Roberts was arrested at her home on the bench warrant by BIA Law Enforcement Officer/Defendant Randy Elliot on February 19, 2011, and again transported to the Tribal jail and held against her will. Again, she bonded out. (ER 62, 63, 88).

A judgment and sentencing order was ultimately entered against Roberts when she failed to appear at a subsequent status conference on April 19, 2011. (ER 89, 90). Again, Roberts had no notice despite her request for all documents

to be mailed to her, and despite the fact that she had not been convicted at any trial and had never changed her plea of not guilty. The record is void of any conviction. (ER 79, 89). Roberts' bond was forfeited, and she was ordered to pay \$25.00 in court fees. (ER 89).

Elliot, Haakanson and Scott each fully knew that Roberts was a Caucasian, was a non-Indian, not a member of any Tribe, and that the Northern Cheyenne Tribal Court had no criminal jurisdiction over her. (ER 103, 104).

After Roberts and her husband Doug Roberts moved to Lame Deer, Montana in 2005 to work for the Lame Deer school district, Roberts' husband was involved in an accident on Highway 212 within the boundaries of the Reservation on March 27, 2006. Roberts was called at school and came out to the accident scene. There were seven or eight BIA officers already there including Officer Scott. They asked Roberts and her husband if they were "white" (non-Indian) and when they confirmed that they were, the BIA officers contacted the Highway Patrol and a MHP officer came out and processed the scene. Even though the accident happened on the Reservation, the case was prosecuted in state court. This was the first discussion Roberts recalls having with the BIA officers, including Defendant Officer Scott, about being non-Indian and about the jurisdictional issues in Tribal court, and that the Tribal court had no criminal

jurisdiction over a non-Indian. (ER 104 at ¶ 15, 110).

Roberts had several interactions with Haakanson during her five years at Lame Deer. As a teacher at the Lame Deer School, she had numerous discussions with BIA officers, including Haakanson, in regards to students and problems with students; and animal deaths at the school farm. Haakanson had been out to the farm a couple times to see what had happened and had been at the school shop a few times as well. When school district employees came onto private FFA's property and took their tractor and baler to pull back to the school, Roberts went to the BIA and had a discussion with Officers Haakanson and Scott wanting "theft charges put against the school employees for taking something that didn't belong to them and entering private property without permission." At that time she got into a jurisdiction discussion with Haakanson as far as "white versus Indian" and because members of the FFA alumni were white, they asked that a Rosebud County deputy be brought in, and that Officer Haakanson called in a county deputy who had a meeting with Haakanson about the issue, and he decided to impound the equipment at the BIA lot. (ER 22 – 31). Roberts' contention that Haakanson was fully aware of her non-Indian status as well as his knowledge of the lack of criminal jurisdiction over a non-Indian in the Tribal Court is uncontroverted.

Roberts had discussions with Officer Scott involving the tractor and baler,

and FFA alumni hired Scott to transport the tractor and “he expressed some concerns that the whites were running this whole thing” but eventually saw it was for the benefit of the kids. The longer the issues escalated, the more Scott tried to make it a “white versus Indian issue.” It is uncontroverted that Scott was fully aware that Roberts was a non-Indian. (ER 31 – 36).

Officer Elliot helped move the FFA livestock incident to the lease property, and stood as a guard officer that day as well. (ER 35 at 5-13, 52 at 3-20).

Roberts had numerous conversations with Officer Elliot who knew she had no Indian blood. This was normally brought up by any officer she spoke with. (ER 64 at 4-21). She had discussed it with Elliot several times as well as related jurisdictional issues. (ER 103, 104). Elliot asserts that he did not know her non-Indian status. (ER 97). This fact is in dispute.

Roberts experienced serious emotional distress caused by the actions of the BIA officers. Roberts had no criminal record prior to being arrested and jailed twice by these BIA officers. (ER 66 at 17-25). Being arrested was extremely traumatic. She was scared to death. Roberts was very modest and had to undress in front of cameras. (ER 67 at 1-25). She had not taken her heart medicine at that time of the day of the arrest and was scared she would have a heart attack while at the jail. (ER 68 at 20-25).

Roberts had lost her health insurance at the time and could not afford to formally go see anyone for mental health treatment. (ER 20 at 11-25, 69).

Roberts did do private one on one counseling with two friends who were trained professionals, one a friend in Minnesota with a master's in social work and the other a school board member in Lame Deer with a master's in social work. (ER 20 at 12-13, 21 at 4-14).

Roberts' administrative tort claim was presented to the BIA on February 17, 2013. (ER 80). Roberts brought an action in federal court against BIA law enforcement officers Haakanson, Elliot, and Scott in their individual capacities on the basis that the officers violated her constitutional rights under the Fourth and Fifth Amendments of the United States Constitution. (CV 13-23-BLG-SEH). (ER 112). Roberts later filed an action against the United States under the Federal Tort Claims Act for false arrest, false imprisonment, and negligent infliction of emotional distress. (CV 14-16-BLG-SEH). (ER 118). The two actions were consolidated. (ER 114). On December 19, 2014, the Defendants moved the District Court for an order granting summary judgment on all claims in the consolidated actions. (ER 114). Plaintiff appeals from the judgment of the District Court granting summary judgment in favor of all Defendants on all claims in this case. (ER 1).



#### IV. SUMMARY OF ARGUMENT

The District Court erred in finding that Roberts' claim against the individual BIA law enforcement officers in their individual capacities is barred by the defense of qualified immunity. The law concerning the lack of criminal jurisdiction over non-Indians on the Northern Cheyenne Tribal Court was well settled and clear in 2010. The Officers were on notice that arresting and detaining a non-Indian in the Tribal jail would be clearly unlawful. The issue as to the Officers' knowledge of Roberts' non-Indian status is uncontroverted by Officers Haakanson and Scott. There are disputed issues of fact as to Officer Elliot's knowledge of Roberts' non-Indian status, which defeat summary judgment.

The District Court also erred in granting summary judgment against Roberts on her claims under the Federal Tort Claim Act. Officer Eliot and the Government knew their conduct of arresting Roberts on a Tribal warrant and imprisoning her in the Tribal jail was unlawful for a non-Indian. An issue of fact exists as to whether the Officer's reliance on the warrant was objectively reasonable.

Last, disputed issues exist as to whether Roberts' serious emotional distress was a reasonably foreseeable consequence of the Government's negligent or unlawful conduct of arresting and detaining Plaintiff in the Tribal jail when the

Officer was on notice that Roberts was a non-Indian.

V.

ARGUMENT

**A. THE DISTRICT COURT ERRED IN FINDING THAT ROBERTS' CLAIMS AGAINST THE BIA LAW ENFORCEMENT OFFICERS IN THEIR INDIVIDUAL CAPACITIES ARE BARRED BY QUALIFIED IMMUNITY AS THERE ARE GENUINE ISSUES OF MATERIAL FACT CONCERNING THE OBJECTIVE LEGAL REASONABLENESS OF THEIR CONDUCT THAT PRECLUDES SUMMARY JUDGMENT.**

**1. Reviewability and Standard of Review.**

The District Court granted summary judgment to Defendants on Plaintiff's constitutional claims against the individual law enforcement officers. The district court's decision to grant summary judgment on the ground of qualified immunity is reviewed de novo. *Garcia v. County of Merced*, 639 F.3d 1206, 1208 (9<sup>th</sup> Cir. 2011). This Court has jurisdiction to review the question whether there is any genuine issue of material fact as to whether an officer's conduct meets the qualified immunity standard of objective legal reasonableness. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996).

In considering a motion for summary judgment, the court is guided by Rule 56, Federal Rules of Civil Procedure. The party moving for summary judgment

carries the initial burden of showing the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court should not weigh the evidence and determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 248. In considering a motion for summary judgment, the Court may not make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9<sup>th</sup> Cir. 1997), *abrogated on other grounds*.

**2. The District Court Clearly Erred in its Findings of Fact Pertinent to the Issue of the Officers’ Qualified Immunity.**

The District Court found that Roberts waived the Tribal Court’s lack of personal jurisdiction at the time of arraignment:

Roberts was advised of her right to assert lack of personal jurisdiction at the time of her arraignment and elected to waive that objection and consented to the Tribal Court’s jurisdiction. (Doc. 35.) Roberts later denied waiving objections to jurisdiction. (Doc. 43 at 12.)

(ER 6 at ¶ 8). However, the record clearly shows that the District Court’s finding is in dispute. This issue of material fact should not be decided by the District Court on a motion for summary judgment.

Tribal Judge Brady asserts that Roberts “waived” the lack of personal jurisdiction over her by the Tribal Court during the arraignment. Roberts does

not recall anything other than entering a not guilty plea and her advocate asking for a jury trial and she does not believe that she waived anything. (ER 41 at 15-19). Judge Brady also asserts that she placed notations at the bottom of the complaint and the return of summons at the arraignment to document Roberts' waiver of the lack of personal jurisdiction. However, these same two documents obtained directly from the clerk of Tribal Court by Roberts on August 17, 2010, do not contain any notation by Judge Brady. (ER 100). Likewise, the Northern Cheyenne Court Criminal Division Minute Entries do not indicate that Roberts waived personal jurisdiction at any time at any hearing in the criminal case, raising genuine issues of material fact as to whether this ever occurred.<sup>2</sup> (ER 90).

Findings of fact are reviewed for clear error. *See Husain v. Olympic Airways*, 316 F.3d 829, 835 (9<sup>th</sup> Cir. 2002). This finding of Roberts' waiver is clearly erroneous as there is ample evidence to the contrary. Moreover, “[o]n appeal the court of appeals . . . must resolve any factual disputes in favor of the plaintiff and decide the legal question as to whether the officials' alleged conduct violated clearly established law.” *Cunningham v. City of Wenatchee*, 345 F.3d

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<sup>2</sup> The Northern Cheyenne Tribal Court may have a rule of criminal procedure allowing the Tribal Court to exercise criminal jurisdiction over a non-Indian if that person “waives” personal jurisdiction. However, as a matter of law, that rule would have no effect when challenged since subject matter jurisdiction cannot be waived. *See United States v. Cotton*, 535 U.S. 635, 640 (2002).

802, 807 (9<sup>th</sup> Cir 2003).

Another clear error of fact is that the Court found that the date the second bench warrant was issued was October 19, 2010. (ER 7 at ¶ 18). A review of the record shows the warrant was issued on October 21, 2010. (ER 87). This specific date is pertinent in that Roberts retained Billings attorney O'Connor after her first arrest because of the Tribal Court's prosecution, arrest, and imprisonment of her, and the lack of any criminal jurisdiction. (ER 101).

On October 20, 2010, Roberts received a copy of a letter written by her counsel Mr. O'Connor advising the prosecutor of the Northern Cheyenne Tribe of the "unlawful criminal charges" and that Roberts was "clearly not subject to the jurisdiction of the Tribal court; that she was "neither a member of the Northern Cheyenne tribe," nor a Native American. He objected to her arrest and her incarceration in the tribal detention facility. (ER 108, 109). The day after the letter by Mr. Connor was sent via facsimile transmission to the Tribal prosecutor, a bench warrant was issued to arrest Roberts on October 21, 2010, pertaining to the objective reasonableness of the Officers' actions. (ER 87, 102).

Also the District Court completely failed to find that the three named BIA officers were all aware that Roberts was a non-Indian and that the Tribal Court had no criminal jurisdiction over her, as attested to by Roberts. This is a genuine

issue of material fact pertaining to Officer Elliot. Elliot attests that he was not aware of Roberts' status (ER 97), but Roberts attests to all the times she discussed her status with these Officers, including Elliot, as well as discussed the issue of jurisdiction in the Tribal Court. (ER 35, 52, 64, 103, 104). Officers Haakanson and Scott did not controvert Roberts' claims of their knowledge of Roberts' status, which is directly relevant to the objective legal reasonableness of their actions in arresting and jailing her.

**3. Genuine Issues of Material Fact Exist as to Whether the Officers' Conduct Met the Qualified Immunity Standard of Objective Legal Reasonableness.**

Roberts brought claims against three BIA law enforcement Officers, Haakanson, Elliot, and Scott, in their individual capacities, for violation of her constitutional rights under the Fourth and Fifth Amendments to the United States Constitution. Her claims against these officers is grounded in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigations*, 403 U.S. 388, 390-93 (1971), where the Supreme Court recognized a private right of action for persons deprived of constitutional rights by federal employees.

Roberts claims that these BIA officers violated her right to due process when they arrested, handcuffed, detained, transported, and delivered her to the Tribal jail in Lame Deer. The bench warrants upon which she was arrested and detained

were entirely void since Roberts is a non-Indian, and the Northern Cheyenne Tribal Court has no criminal jurisdiction over non-Indians. The record shows that each of these Officers were specifically aware that she was non-Indian, and that the Tribal Court lacked any criminal jurisdiction over her.

The District Court determined that Roberts' claims against these officers are barred by their defense of qualified immunity. Qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). In *Harlow*, the Supreme Court recognized that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public officer should know the law governing his conduct." *Id.*, 475 U.S. at 818.

The three BIA officers in the case at bar knew or should have known that the Tribal Court had no criminal jurisdiction over non-Indians, and they clearly knew that Roberts was a non-Indian since they had many contacts with Roberts while she resided on the Northern Cheyenne Reservation and worked at the Lame Deer School. Just a glance at the warrant would show that it was facially deficient since it names a non-Indian to appear before the Tribal Court on a criminal matter.

These BIA officers did cross a “constitutional bright line” as they were fully on notice that their conduct would be unlawful.

The District Court also recognized that these protections may insulate a defendant’s conduct even if a plaintiff’s rights were violated, citing *McCullough v. Wandanch Union Free School District*, 187 F.3d 272, 277 (2<sup>nd</sup> Cir. 1999). The District Court recognized that the qualified immunity defense does not allow for an award of damages for a violation of rights as long as the official action did not cross a constitutional or statutory bright line, citing *Davis v. Scherer*, 468 US. 183, 190 (1984) (even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.)

The law must put the officer on notice that his conduct would be clearly unlawful. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001). In *Saucier*, the Supreme Court set forth a two part process for analyzing the application of qualified immunity. First, it is determined whether an officer’s conduct violated a constitutional right. *Id.* In the case at bar, these officers clearly violated Roberts’ right to due process by citing, arresting and detaining her when the Tribal Court had no criminal jurisdiction over her. The next step is to determine whether the law was clearly established. *Id.*



The District Court found that the individual officers are entitled to qualified immunity defense on the basis of the second prong of the analysis, that the “law was not clearly established at the time of Roberts’ arrest that the officer’s conduct was unlawful.” (ER 12). The District Court found that the arrest warrants were facially valid when issued. The question concerning qualified immunity before this Court is whether Officers Haakanson, Elliot and Scott’s involvement in arresting a non-Indian and transporting her to be detained in the Tribal Jail crossed a constitutional or statutory bright line, and whether the law was clearly established at the time that the Tribal Court had no criminal jurisdiction over non-Indians.

In 1978 (thirty-two years prior to the Officers’ action taken against Roberts), in *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191 (1978), the United States Supreme Court held by implication that the Suquamish Tribe’s judiciary had no criminal jurisdiction over non-Indians. The Court’s holding stands for the principle that a small minority should not be allowed to dictate law over a large majority in a court that has less procedural protection than the majority would otherwise be entitled. *Oliphant*, 435 U.S. at 212. The Supreme Court went so far as to hold that as a whole, “Indian tribes do not have inherent jurisdiction to try and punish non-Indians.” *Id.* *Oliphant* is the controlling authority in this case with respect to the lack of criminal jurisdiction over Roberts, a non-Indian. The

Northern Cheyenne Tribal Court simply does not have criminal jurisdiction over a non-Indian and had no subject matter jurisdiction over Roberts. A reasonably competent law enforcement officer who is employed on an Indian Reservation should be charged with this knowledge of the criminal law.

Each Tribal Court warrant served upon Roberts was entirely void from the start of the criminal case because the Tribal Court lacked any subject matter jurisdiction over non-Indians, including Roberts, on the Northern Cheyenne Reservation. Judge Brady admitted that she know Roberts was a non-Indian. (ER 92, 93). Officers Scott and Haakanson do not dispute Roberts' assertion that they knew she was a non-Indian, and that they knew the Tribe lacked any criminal jurisdiction over non-Indians. While Elliot claims he did not know Roberts' status, this fact is in dispute and should be resolved in Roberts' favor for purposes of summary judgment.<sup>3</sup>

The warrants served on Roberts were facially deficient as they were

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<sup>3</sup> “Subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.” *United States v. Cotton*, 535 U.S. 635, 640 (2002).

commanding a non-Indian into a Tribal court that lacked any criminal jurisdiction. *See Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (order can be facially invalid if it was issued in the “clear absence of all jurisdiction.”) These BIA officers did more than serve Roberts with a void warrant or court order from the Northern Cheyenne Tribal Court. They detained her against her will when they put her under arrest; they handcuffed her; they transported her to jail and delivered her to the BIA detention facility to be incarcerated in a jail that only held Indian persons.

These BIA officers specifically knew that Roberts was a non-Indian and not the member of any Tribe. They had had many contacts with Roberts in the past. (ER 22-36, 64, 97, 103, 104). Being Officers that specifically enforced law on an Indian Reservation, they knew that the Tribal criminal court did not extend to non-Indians. These officers exercised discretion in their actions. It would require a stretch of the imagination to think these Officers did not know the proper procedures involving non-Indians in a criminal matter. While jurisdictional tribal issues in civil cases are complex, the only issue whatsoever in the instant case is whether the person is a non-Indian. There is simply no criminal jurisdiction over a non-Indian. This law was “clearly established” and “sufficiently clear” in 2010 and 2011. These BIA Officers were on notice that the Tribal Court acted in complete absence of jurisdiction in issuing the warrants. In carrying out the

mandate, these Officers would have known they were engaging in an unlawful act. At the minimum, there are genuine issues of material fact that would preclude summary judgment.

**B. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ROBERTS' FTCA CLAIMS AGAINST THE UNITED STATES BECAUSE ROBERTS CAN SUSTAIN HER CLAIMS UNDER MONTANA LAW.**

**3. Reviewability and Standard of Review.**

This Court reviews de novo a district court's grant of summary judgment.

*Shelley v. Geren*, 666 F.3d 599, 603 (9<sup>th</sup> Cir. 2012).

**4. Roberts' Claims Against the United States Under the FTCA Can Be Sustained under Montana Law.**

Roberts relies on the Federal Torts Claims Act (FTCA) for its sovereign immunity and grant of jurisdiction in this Court.<sup>4</sup> The FTCA provides, in part, that “[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .” 28 U.S.C. § 2674.

The District Court stated that to establish a claim of false arrest and false

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<sup>4</sup> Roberts' claim involving her arrest and her incarceration on February 17, 2011 is the only claim that applies under the FTCA.

imprisonment under Montana law, a plaintiff must demonstrate: “(1) the restraint of an individual against his will, and (2) the unlawfulness of the restraint,” citing *Kichnet v. Butte Silverbow County*, 274 P.3d 740, 745 (Mont. 2012). The District Court determined that Roberts cannot establish the second element, since probable cause for arrest is a complete defense to claims of false arrest and false imprisonment. The District Court fails to show where in the record the finding of probable cause exists for this specific warrant.

Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.” *United States v. Loper*, 482 F.3d 1067, 1072 (9<sup>th</sup> Cir. 2007). It is unknown how an officer with knowledge of Roberts being a non-Indian and with knowledge of the lack of criminal jurisdiction could reasonably believe there was probable cause to bring Roberts before a Tribal Court that had no jurisdiction over her.

The warrant was not valid on its face as it was compelling a non-Indian into the Tribal court. The warrant was issued solely because Roberts did not appear at a status hearing before a Tribal court that had no criminal jurisdiction over her and for which she received no notice of the hearing. A warrant that is improper does not necessarily constitute probable cause for an arrest. For example, *see, Berg v.*

*County of Allegheny*, 219 F.3d 261, 271, (3rd Cir 2000) (holding that improperly issued warrant cannot constitute probable cause for an arrest.)

Moreover, the question would become whether a reasonably well-trained officer would have realized that there was wholly insufficient probable cause to issue the warrant. *United States v. Leon*, 468 U.S. 897, 922-25 (1984). While *Leon* addresses the issue of the Exclusionary Rule, the Supreme Court's holding lends authority to the concept that a law enforcement officer is not simply required to blindly follow the commands of a warrant if not reasonable. *Leon*, 468 U.S. at 913-916.

The deference accorded to a magistrate's finding of probable cause for the issuance of a warrant does not preclude inquiry into the knowing or reckless falsity of the affidavit on which the probable cause determination was based. *Id.*, 468 U.S. at 918-921. The Supreme Court recognized that a police officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant she issues must be objectively reasonable. *Id.* An officer would not manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render an official belief in its existence entirely unreasonable. The executing officer cannot reasonably presume it to be valid. *Leon*, 468 U.S. at 918-22. At the minimum, there are genuine issues of

material fact as to Officer Elliot's belief as to the validity of the warrant, precluding summary judgment.

**5. The District Court Erred in Granting Summary Judgment on Roberts' Claim of Negligent Infliction of Emotional Distress Because Genuine Issues of Material Fact Exist Concerning the Reasonableness of the Officer's Conduct.**

Roberts alleged a cause of action for negligent infliction of emotional distress against the United States. The District Court granted summary judgment to the Defendant United States on Roberts' claim of negligent infliction of emotional distress. (ER 15).

An independent cause of action for negligent infliction of emotional distress arises under circumstances where (1) serious or severe emotional distress to the plaintiff was (2) the reasonably foreseeable consequence of (3) that defendant's negligent act or omission. *Sacco v. High Country Independent Press*, 271 Mont. 209, 234, 896 P.2d 411, 416-428 (1995). The level of emotional distress suffered by Roberts as a result of the Government's actions rises to the level of being actionable. The record shows she has suffered serious emotional distress under the *Sacco* standard.

The Court is to first determine whether, on the evidence, serious emotional distress can be found. *Renville v. Fredrickson*, 2004 MT 234, 16, 324 Mont. 86, 101 P.3d 773. If the Court makes this determination, then the fact-finder must

determine if, on the evidence, it has in fact existed. *Popisil v. First Nat. Bank of Lewistown*, 2001 MT 286, § 24, 307 Mont. 704.

In *Czajkowski v. Meyers*, 2007 MT 234, 36-37, 339 Mont. 503, 172 P.3d 94, the Montana Supreme Court found emotional distress when the Meyers endured an “unrelenting barrage of obscene gestures and verbal abuse and an on-going surveillance of plaintiffs’ outdoor activities. The district court found that Ms. Meyers “was fearful, lost countless hours of sleep, lost weight, and her hand would shake.” *Id.* at 33. Mr. Meyers was “extremely angry” about treatment of him and his wife, felt apprehension about going outside and felt he was always looking over his shoulder; that he had no privacy, and that he was embarrassed.

In a federal case out of Montana, *Peschel v. City of Missoula*, 664 F. Supp.2d 1149, 1165 (Mont. 2009), Peschel claimed that the police department’s accusations against him have been “embarrassing to him and detrimental to his reputation.” He also asserted he experienced “fright, humiliation, disgrace, [and] embarrassment [.]” The court found his suffering consistent with the definition of serious emotional distress adopted in *Sacco*, and concluded that he cited sufficient evidence on which a jury could find him in such distress. *Id.* at 1165.

Roberts experienced serious emotional distress caused by the actions of the BIA officers. She had no criminal record prior to being arrested and jailed twice



by these BIA officers. (ER 66). Being arrested was extremely traumatic. She was scared to death. (ER 66, 67). Roberts was very modest and had to undress in front of cameras. She had not taken her heart medicine at that time of the day of the arrest and was scared she would have a heart attack while at the jail. (ER 68).

The District Court simply found that Officer Elliot's actions in executing the Tribal Court warrant was not a negligent or wrongful act or omission. Again, it is disputed whether or not Elliot knew her status and knew of the Tribal Court's lack of any jurisdiction over her. Roberts claims that Elliot was entirely aware of her non-Indian status as well of the lack of criminal jurisdiction. It is in dispute whether or not Elliot had a reasonable basis to believe that the warrant and his actions were valid and lawful, or void and unlawful. Elliot does not contest Roberts' assertion that they had many conversations about her non-Indian status and the issue of jurisdiction. Certainly, the trier of fact could find that Officer Elliot's actions were not reasonable under the circumstances, and that Roberts suffered serious emotional distress consistent with the definition adopted in *Sacco*. The District Court erred in deciding these factual disputes upon the Defendants' motion for summary judgment.

## **VI. CONCLUSION**

For the foregoing reasons, Plaintiff/Appellant Sherri Roberts respectfully requests that this Court reverse the decision of the District Court, granting summary judgment to the Defendants, and remand the case to the District Court for trial.

**DATED** this 26th day of October, 2015.

**HONAKER LAW FIRM**

*/s/ Elizabeth J. Honaker*  
**Attorney for Plaintiff/Appellant**

## **VII. STATEMENT OF RELATED CASES**

Counsel for Plaintiff certifies that she is not aware of any related cases to the instant appeal.

### VIII. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Rules of the United States Court of Appeals for the Ninth Circuit and Circuit Rule 32-1, I hereby certify that this Brief of Appellant is printed with a proportionately spaced Times New Roman text typeface of 14 points, and the word count is 6,517, excluding caption, certificate of service, and certificate of compliance. I have relied on the word count of a word-processing system used to prepare the brief.

DATED this 26th day of October, 2015.

s/s Elizabeth J. Honaker  
Elizabeth J. Honaker  
Attorney for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 26, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system sent to:

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